IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1019

BOSTON STOCK EXCHANGE, CINCINNATI STOCK EXCHANGE, DETROIT STOCK EXCHANGE, MIDWEST STOCK EXCHANGE, INCORPORATED, PACIFIC COAST STOCK EXCHANGE, PBW STOCK EXCHANGE, INC.,

Plaintiffs-Appellants

v.

STATE TAX COMMISSION, NORMAN GALLMAN, MILTON KOERNER, and A. BRUCE MANLEY, as members of the State Tax Commission of the State of New York,

Defendants-Appellants.

ON APPEAL FROM THE STATE OF NEW YORK COURT OF APPEALS

BRIEF IN OPPOSITION TO MOTION TO DISMISS

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The Motion to Dismiss filed by Defendants-Appellees (hereinafter referred to as "defendants") fails to counter the arguments in the Jurisdictional Statement that this Court has jurisdiction under 28 U.S.C. § 1257(2) and that the question presented is substantial.

I. THE MOTION TO DISMISS MISSTATES THE QUESTION PRESENTED BY THIS APPEAL.

The question presented is not, as defendants assert, whether New York State has the constitutional power to impose a tax on the sale, transfer or delivery of securities within the state. As plaintiffs-appellants (hereinafter referred to as "plaintiffs") stated in their Jurisdictional

Statement, this authority has never been contested and is not in issue in this case.[1] The question that *is* presented is whether the State of New York may constitutionally maintain a tax scheme, the purpose and effect of which is "to protect and preserve the State's securities industry, the State's economy, and the public revenue" (Motion to Dismiss, p. 2) by discriminating against stock exchanges located outside of New York in favor of stock exchanges located in New York.

Defendants' misstatement of the question presented by this appeal undoubtedly accounts for their heavy reliance on *Freeman* v. *Hewitt,* 329 U.S. 249 (1946), for that case dealt only with the jurisdictional power of a state to tax an interstate sale of securities, an issue plaintiffs at no point have raised. Thus, *Freeman* v. *Hewitt* does not "dispose of" the cases plaintiffs cite in the Jurisdictional Statement (Motion to Dismiss, p. 19). Each of those cases assumes the authority of a state to tax the local incident of interstate commerce; the question they address is whether an otherwise permissible tax so discriminates against out-of-state businesses in favor of in-state businesses that it violates the commerce clause of the United States Constitution. That is precisely the issue presented by the present appeal.

Defendants' misstatement of the question presented must also account for their assertion that *Halliburton Oil Well Co.* v. *Reily,* 373 U.S. 64 (1963) is not in point. (Motion to

[1] Jurisdictional Statement, p. 14, n. 13. Because plaintiffs have never questioned New York State's authority to impose a non-discriminatory tax on the in-state transfer and delivery of securities, plaintiffs' explicit recognition of that authority in this appeal cannot be a "concession" as defendants assert. (Motion to Dismiss, p. 17.) Defendants also assert that plaintiffs' argument that the New York tax discriminates against their "business" is a "new point not raised below." (Motion to Dismiss, p. 17) This is also incorrect. Paragraph 13 of plaintiffs' complaint, printed as an Appendix to this brief, makes clear that from the outset the commerce clause issue in this case has focused on the discriminatory impact of the transfer tax on plaintiffs in their competition with the New York exchanges.

Dismiss, p. 20) Rather than not being in point, *Halliburton* should control the result in this case. There, as here, persons performing two activities in-state (there, manufacture and use; here, sale and transfer) were taxed less heavily than persons performing only one activity in-state (there, use; here, transfer). There, as here, the principle to be applied is the "strict rule of equality": equal treatment of similarly situated taxpayers without regard for whether certain of their activities occur in-state or out-of-state. 373 U.S. at 70. Judged in accordance with this principle, section 270-a of the New York transfer tax is unconstitutional.

Defendants' citation of *Seagram and Son* v. *Hostetter,* 384 U.S. 35 (1965), also reflects their misunderstanding of the question presented by this case. Plaintiffs agree with the principle announced in *Seagram* that "the mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids." 384 U.S. at 43. But that statement poses rather than answers the question presented here, *i.e.,* whether the discriminatory impact of New York's transfer tax places that tax within or without the domain forbidden by the commerce clause.[2]

II. DEFENDANTS INCORRECTLY CHARACTERIZE THE TRANSFER TAX AS "IN FAVOR OF COMMERCE" WHEN IN FACT ITS CONSEQUENCES RUN PRECISELY COUNTER TO THE OBJECTIVES OF THE COMMERCE CLAUSE.

Defendants assert that the New York transfer tax is not a barrier to interstate commerce because it is "intended and designed in *favor* of such commerce by encouraging the

[2] Appellees' use of *Seagram* is particularly inappropriate here because that case involved a state's authority with respect to the regulation of liquor. It is well-settled that state action founded in the states' power under the twenty-first amendment need not conform to the same commerce clause strictures required of ordinary state taxing and regulatory enactments. As this Court stated in *Seagram,* 384 U.S. at 42:

> A state is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants. . . .

occurrence of stock transactions involving non-residents in the State of New York" (Motion to Dismiss, p. 14). This totally disregards the consequences of the transfer tax for New York residents who, as even the Court of Appeals recognized, are required to pay higher rates if they sell out-of-state, *i.e.,* utilize interstate commerce, than if they sell on in-state stock exchanges. Further, defendants' argument flies in the face of the *Halliburton* decision which held unconstitutional a discriminatory tax scheme precisely because it created an economic inducement for non-residents to manufacture goods in Louisiana when they intended to use those goods in the state. As this Court stated in *Halliburton,* 373 U.S. at 73:

> . . . Clearly, approval of the Louisiana use tax in this case would "invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause."

III. THE MOTION TO DISMISS FAILS TO SHOW THERE IS NOT ADEQUATE JURISDICTIONAL BASIS FOR THIS APPEAL.

The Court of Appeals' treatment of plaintiffs' commerce clause argument is not made stronger by being quoted in full. (Motion to Dismiss, pp. 15-17) The inadequacies of the Court of Appeals' arguments were demonstrated in plaintiffs' Jurisdictional Statement, pp. 14-21, and the mere assertion that the opinion "correctly disposed" of plaintiffs' arguments cannot overcome these infirmities.[3]

The case law cited in the Jurisdictional Statement in support of the proposition that the commerce clause forbids discrimination against out-of-state businesses to pro-

[3] Moreover, defendants now concede that *Miller Bros.* v. *Maryland,* 347 U.S. 340 (1950), is irrelevant to the issue presented by this case. (Motion to Dismiss, p. 20) This is one of only two authorities relied upon by the Court of Appeals for its argument that the transfer tax scheme was justifiable as "compensatory legislation". Plaintiffs' distinction of the other authority, *Alaska* v. *Artic Maid,* 366 U.S. 199 (1961), is in no way challenged by defendants' motion.

tect in-state businesses is virtually unchallenged by the Motion to Dismiss. Defendants attempt to avoid the implications of *Welton* v. *Missouri,* 91 U.S. 275 (1875), *Nippert* v. *Richmond,* 327 U.S. 416 (1945), and other cases, not by showing their holdings to be inapposite but merely by asserting that they are irrelevant. Further, defendants are incorrect in stating that plaintiffs improperly rely on cases involving states' regulatory instead of taxing powers. Precisely the same constitutional principles protect interstate commerce from discriminatory burdens which are imposed by the states' regulatory power as those which are imposed by the states' taxing power. Indeed, this Court's opinions frequently cross-cite opinions in regulatory and tax cases.[4]

The Jurisdictional Statement establishes the substantial impact of New York State's discriminatory tax scheme on interstate competition between out-of-state exchanges and New York exchanges. The Motion to Dismiss offers no arguments to the contrary.[5] The assurance of free flowing competition among businesses of all states is the essence of the commerce clause. New York's enforcement of a tax scheme that suppresses competition from outside the state is opposed to a long and well established line of cases decided by this Court. It should not be permitted to continue.

[4] *See,* for example, the quotation from Justice Cardozo's opinion in *Baldwin* v. *G.A.F. Seelig, Inc.,* 294 U.S. 511, 527 (1935), reprinted at p. 18 of plaintiffs' Jurisdictional Statement and the quotation from *Halliburton,* a tax case, citing regulatory cases, which is reprinted on p. 13 of the Statement.

[5] The Motion to Dismiss asserts that "the volume of trading on appellants' exchanges were (sic) hardly affected by ch. 827" (p. 17, note). This assertion raises factual issues that, of course, should not be introduced on appeal. But more importantly, it misses the point of plaintiffs' complaint against the discriminatory transfer tax scheme: If New York may enforce a tax scheme that suppresses competition from outside that state, the guiding principle of commerce clause cases decided by this Court to date is violated. Furthermore, as long as the discriminatory scheme exists, inhibiting natural competitive advantages that plaintiffs' exchanges have over New York exchanges, the potential volume of plaintiffs' business must be assumed to be greater than the volume existing under the discriminatory tax scheme.

CONCLUSION

The Jurisdictional Statement filed by the plaintiffs demonstrates that a substantial federal question is presented on appeal. The Motion to Dismiss filed by defendants fails to show that consideration of this case by this Court is unwarranted. Therefore, probable jurisdiction should be noted.

Respectfully submitted,
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Appendix

Complaint

. . . .

13. Clause 3 of Section 8 of Article 1 of the Constitution of the United States (the "Commerce Clause") vests in the Congress of the United States the exclusive power to regulate commerce among the several states. The sale of Taxed Securities made outside New York State or made by or through the facilities of any plaintiff herein is "commerce among the several states" within the meaning of the Commerce Clause. The Commerce Clause prohibits State legislation which interferes with interstate commerce by placing an undue burden upon or discriminating against interstate commerce. The 1969 Amendments are unconstitutional in that they violate the Commerce Clause because:

(a) they unduly burden interstate commerce by imposing a higher rate of tax when sales by nonresidents of Taxed Securities are made outside the State of New York than when such sales are made within the State of New York;

(b) they discriminate against plaintiff Exchanges, their members and the customers of such members by increasing the cost of selling Taxed Securities in, or using the facilities of, interstate commerce outside the State of New York;

(c) they protect citizens and businesses within the State of New York from competition in interstate commerce through the imposition of higher rates of tax on transfers when sales of Taxed Securities are made outside the State of New York than when such sales are made within the State of New York;

(d) they create a tax rate differential which bears no relationship to the taxpayers' activities or enjoy-

ment of opportunities and protections within the State and which, in fact, discriminatorily, arbitrarily, and unreasonably imposes a lesser tax on transactions which involve greater activity within the State of New York; and

(e) they utilize the state taxing power to regulate commerce between the states by seeking to adjust competitive advantages between local stock exchanges and others in the New York securities industry on the one hand, and their counterparts outside of New York on the other. . . .